

UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF ARIZONA

**In re COLLEGE PROPERTIES
LIMITED PARTNERSHIP, a limited
partnership,**

**In re COLLEGE PROPERTIES II, an
Arizona limited partnership,**

Debtors.

**Chapter 11 Proceedings
Case No. 02-05-10095-PHX-CGC and
Case No. 02-05-15155-RJH**

Jointly Administered

**UNDER ADVISEMENT DECISION
RE: APPLICATION FOR APPROVAL
AND PAYMENT OF COMPENSATION
AND REIMBURSEMENT OF
EXPENSES TO STEGALL, KATZ &
WHITAKER, P.C. AS ATTORNEY
FOR THE GENERAL PARTNER**

I. Introduction and Background

Stegall, Katz & Whitaker, P.C. ("Stegall") represents Thomas D'Ambrosio, the general partner of the debtors. It has filed an application for legal fees and costs incurred after January 8, 2007, the date the Settlement Agreement and Comprehensive Release ("SACR") was signed, in the amounts of \$34,570.00 and \$1,359.66. An objection was filed by Anthony dePetris.¹

II. Discussion

A. Background

The SACR states that "Non-Settling Parties need to recognize that if the GP or any other party is successful in defending the claims, such parties shall have a claim to recover attorneys' fees and costs from the Non-Settling Party Funds." This provision imposes three requirements to recover fees from Non-Settling Party Funds: 1) the Funds against which fees are recoverable are those otherwise distributable to Non-Settling Parties who actually pursued claims after the settlement; 2) the fees must be incurred in defending claims brought in litigation by parties who have not accepted the SACR; and 3) the defense of such claims must have been "successful."

¹The objection was filed by Donald Hudspeth who, for a time, represented Mr. DePetris. Joseph T. Stewart later was substituted in his place. Mr. Stewart prosecuted the objection at the hearing but did not file any further pleadings on the subject.

1 B. Point 1: The Source of the Fees

2 The post-settlement claim brought here consists of the appeal filed from the order
3 approving the SACR. For the reasons stated in the memorandum decision of even date relating
4 to the Trustee's fee application (the "Trustee Decision"), the Court finds and concludes that the
5 Non-Settling Parties Funds otherwise distributable to the dePetrus and Palmer, the two parties
6 who appealed, may be used to pay Stegall's fees to the extent they are reasonable and
7 appropriate and are authorized under Paragraph 5 of the SACR.

8 C. Point 2: The Nature of the Fees

9 The Stegall Application divides fees into three components: 1) general post-settlement
10 fees; 2) fees relating to challenging special counsel fees; and 3) fees incurred in preparing the fee
11 application. At the hearing, counsel conceded that the second category should be excluded and
12 the Court finds that the third category is not within the contemplation of Paragraph 5. Therefore,
13 the analysis turns to the first category.

14 A substantial amount of the fees (\$8080.00) was incurred prior to the commencement of
15 the appeal. These dealt broadly with coordination with Trustee's counsel, advice to the general
16 partner, correspondence with the limited partners, and correspondence with Objector's counsel.
17 None of these fees are within the contemplation of Paragraph 5 and will be disallowed for that
18 reason. Of the fees incurred after the filing of the notice of appeal, \$11,740 dealt directly with
19 the prosecution of the appeal and the remainder were of a similar nature to the pre-appeal fees.

20 Objector challenges whether any of the fees were necessary and argues, instead, that they
21 were duplicative. While the primary sponsor of the SACR was the Trustee, the general partner
22 had a very large stake in its success. For example, he was the target defendant in litigation
23 dismissed as part of the SACR and the focus of most of the ire of the disappointed limited
24 partners. Therefore, it was appropriate for his counsel to defend the appeal separately from the
25 Trustee. The Court has reviewed the fees and the amounts sought for this purpose are
26 reasonable.²

27
28

²Identifiable costs related to the appeal total \$380.51.

1 D. Has the defense been successful?

2 Objector argues that it is premature to award any fees because "success," or the lack of it,
3 will not be known until the appeal is decided by the Circuit. There is merit in this contention.
4 While Stegall may believe and argue that the appeal has little chance of success because of
5 existing 9th Circuit authority on equitable mootness, none of us will know whether the Circuit
6 agrees until the decision is made. Therefore, the Court will award to Stegall fees of \$11,740.00
7 and costs of \$380.51 for the appeal to date subject to a decision at the Circuit either dismissing
8 the appeal or affirming the bankruptcy court decision. Until that result is known, the Trustee
9 shall sequester funds sufficient to pay the fees. This decision is without prejudice to a further
10 application for fees incurred in the continuing appeal.

11 Counsel to submit a form of order.

12 So ordered.

13 **DATED: November 13, 2007**

14
15
16 
17 CHARLES G. CASE II
18 UNITED STATES BANKRUPTCY JUDGE

19 **COPY** of the foregoing mailed by the BNC and/or
20 sent by auto-generated mail to:

21 Clifford B. Altfeld
22 Altfeld Battaile & Goldman
23 250 N. Meyer Avenue
24 Tucson, Arizona 85701-1090
25 Special Counsel to Trustee

26 Brian J. Mullen
27 P.O. Box 32247
28 Phoenix, Arizona 85064
Chapter 11 Trustee

James E. Cross
Brenda K. Martin
Osborn, Maledon, PA

2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2974
Attorneys for Brian J. Mullen, Trustee

Charles T. Stegall
Loren I. Thorson
Stegall, Katz & Whitaker, PC
531 E. Thomas Road, suite 102
Phoenix, Arizona 85012-3239
Attorneys for Tom D'Ambrosio

Charles J. Kelhoffer
Tamlyn E. Lewis
Geoffrey M. Khotim
Ridenour, Heinton, Kelhoffer, Lewis & Garth, PLLC
201 N. Central Avenue, Suite 3300
Phoenix, Arizona 85004
Attorneys for Montage Industries, Inc.,
Black Mountain Homes, LLC and
Casa del Oro Development, LLC

Randy Nussbaum
Kevin J. Rattay
Jaburg & Wilk, PC
3200 N. Central Avenue, Suite 2000
Phoenix, Arizona 85012-2440
Attorneys for Montage Industries, Inc.,
Black Mountain Homes, LLC and
Casa del Oro Development, LLC

Joseph T. Stewart
Law Office of Joseph T. Stewart
1100 E. Washington Street, Suite 200
Phoenix, Arizona 85034-1090
Attorneys for Anthony DePetrus and Patricia Palmer

Richard Cuellar
Office of the U.S. Trustee
230 N. First Avenue, Suite 204
Phoenix, Arizona 85003

Jerry L. Carlson
14582 W. Zuni Trail
Surprise, Arizona 85374

E.C. Scappatura, M.D.
No address provided

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28